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CERCLA Off-Site Policy: Providing Notice to Facilities

(U.S.) Environmental Protection Agency, Washington, DC

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13. Abstract: Assists in providing notice to commercial treatment, storage, and disposal(TSDs) facilities deemed ineligible to receive CERCLA response wastes. Outlines procedures for facilities to submit written comments on the application of the policy to the conditions alleged at their facility.

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WASHINGTON, D.C. 20460

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OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER Directive 9330.2-05

MEMORANDUM

SUBJECT: CERCLA Off-site Policy: Providing Notice to Facilities

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators, Region I-X

Background

On May 6, 1985, the Acting Assistant Administrator issued interim guidance on Procedures for Planning and Implementing Off-site Response Actions (Off-site Policy). Its purpose was to provide criteria for selection of off-site commercial waste treatment, storage and disposal facilities which may receive hazardous substances from sites where response actions are taken under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). These criteria are necessary to prevent CERCLA generated wastes from contributing to present or possible future environmental problems, and to minimize the potential for future federal liability at problem facilities. Key provisions of the policy include:

- A preference is established for use of treatment, re-use or recycling over land disposal.
- Wastes may only be sent to permitted (or interim status) facilities.
- Land disposal facilities must meet the minimum technical requirements established by the Hazardous and Solid Waste Amendments of 1984 (double liner, etc) absent a showing that other facilities can provide adequate protection.
- Facilities must have no significant violations or other physical conditions which may pose a significant threat.

The interim guidance was made effective June 5, 1985 and was subsequently published in the Federal Register November 5, 1985 and comments from the public were sought. Comments were received from states, other federal agencies, commercial facilities, major chemical companies and other organizations. As a result of those comments and experience gained in the first year of implementing the policy, revisions will be made and the policy will be published as a final Agency policy later this spring.

Issue - Notice to Facilities

Some commenters pointed out that the interim policy provides no specific requirement or mechanism for notifying facilities that violations or other conditions at their facility make them ineligible for receipt of Superfund wastes. Because the policy will affect the ability of a facility to receive Superfund response wastes, commenters argue that notice and opportunity to respond be provided before final determinations of ineligibility are made.

In adopting procedures that address the comment, EPA must consider several concerns:

- Programmatic need to ensure that wastes are not sent to facilities which do not meet the criteria of the policy.
- Accommodation of notice and fairness concerns, consistent with the nature of these decisions.
- Avoiding interference with enforcement actions which are the basis for decisions made under the policy.
- Resource limitations of EPA regional offices.

The following procedures are an attempt to balance all of the above concerns.

Notice Procedures

- Regions should provide written notice to facilities of their status under the policy, generally concurrent with the bringing of enforcement action for significant violations (generally Class I). Notice may be given at any time after discovery of a violation. Where a significant lag is expected between notification and bringing of a formal enforcement action, notice should generally be accompanied by a notice of violation. The facility becomes ineligible to receive Superfund wastes upon notification.

- Notice should be provided through standard language incorporated into transmittal letters for AOs or NOVs, or through a form letter when civil actions are brought (see attached language).

- Notice should provide an opportunity for the facility to submit written response to EPA as to the application of the policy to the fact situation alleged in the enforcement action. Comments as to the validity of the allegation of violations would not be considered in the context of determinations under the policy. (Any such concerns should be addressed in the forum provided as part of the enforcement action).

- Regions should provide written response to comments submitted, addressing only those related to the application of the policy, not the merits of the enforcement action. The response should be signed by the appropriate Division Director and should include a final statement as to the eligibility or ineligibility of the facility.

- Where enforcement actions (NOV, AO, Civil Action) were brought by an authorized state, Regions should provide similar written notice upon receipt of information on significant violations from the state. Regions may arrange agreements whereby states provide notice directly concurrent with their enforcement action. However, written comment should be directed to both EPA and the State, with EPA participation in the final eligibility determination.

- Where determinations of ineligibility are made based on "other conditions" Regions should give similar notice identifying those conditions which trigger ineligibility under the policy. Facilities should be invited to comment on the application of the policy to the conditions cited. Unless those conditions are also the subject of a concurrent or ongoing enforcement action under RCRA §3008(h) or other authority, Regions should also request and respond to comments related to the validity of findings.

Interim Guidance

The procedures outlined above are intended to be used by Regions on an interim basis pending revision to the Off-site Policy this spring. At that time, provisions for notice to facilities will be incorporated into the policy. Regional comment

Directive # 9330.2-5

on these procedures is solicted and should be directed to Michael Kilpatrick of the Office of Waste Programs Enforcement (WH-527).

Attachment

cc: Marcia Williams, Director OSW
Henry Longest, Director OERR

INSERT FOR NOV OR COVER LETTER FOR AO

Applicability of EPA's Off-Site Policy to the _____ facility.

On May 6, 1985, the Acting Assistant Administrator issued interim guidance on Procedures for Planning and Implementing Off-site Response Actions (Off-site Policy). Its purpose was to provide criteria for selection of off-site commercial waste treatment, storage and disposal facilities which may be used for response actions taken under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). These criteria are necessary to prevent CERCLA generated wastes from contributing to present or possible future environmental problems. A key provision of the policy is that facilities must have no significant violations or other physical conditions which may pose a significant threat.

As a result of the violation(s) and/or conditions described herein, your facility is ineligible to receive waste from response actions taken under CERCLA. If you have any information which indicates that your facility does meet the criteria set out in EPA's off-site policy please provide this information, in writing to:

Regional Division Director
[Address]

The Agency will fully respond in writing, within 30 days, to any comments regarding the applicability of the off-site policy to violations/conditions described. Comments addressing the validity of alleged violations or conditions which are the basis of an enforcement action will not be considered in the content of this determination.